UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

- x

In the Matter of:

SEARS HOLDING CORPORATION,

Debtor.

- x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

May 14, 2021

2:07 PM

B E F O R E :

HON ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re THE EVIDENTIARY HEARING ON SEARS HOLDING CORPORATION WILL BE CONDUCTED USING ZOOM FOR GOVERNMENT VIDEO CONFERENCING. THOSE THAT REQUIRE ACCESS TO THE HEARING MUST EMAIL CHAMBERS AT RDD.CHAMBERS@NYSB.USCOURTS.GOV FOR DIAL-IN AND ZOOM ACCESS CREDENTIALS.

HEARING re Order signed on 5/10/2021 Establishing Procedures for Remote Evidentiary Hearing Beginning May 14, 2021 on the Class Representatives Motion for Relief From the Automatic Stay (related document(s)62 1 2), with hearing to be held on 5/14/2021 at 10:00 AM at Videoconference (ZoomGov) (ROD). (ECF #9479)

HEARING re Evidentiary Hearing - re: Motion for Relief from Stay filed by James P. Pagano on behalf of Movants/Class Representatives Nina and Gerald Greene (ECF #6212) by Stipulation and Pre-Trial Scheduling Order Signed on 3/2/2020 Among Transform Holdco LLC and Greene Class Action Plaintiffs (related document(s)73 1 3, 6212)

HEARING re Notice of Hearing on Class Representatives Motion for Relief from the Automatic Stay (related document(s)6212, 6366) (ECF #9452)

HEARING re Reply Memorandum of Law IN FURTHER SUPPORT OF MOTION FOR RELIEF FROM THE AUTOMATIC STAY (related document(s)6212) filed by Benjamin M Mather on behalf of Nina & Gerald Greene. (ECF #9470)

HEARING re Reply to Motion I Transform Holdco LLC's Reply to the Class Representatives' Motion for Relief from Automatic Stay (related document 6366) (related document(s)62 1 2) filed by Luke A Barefoot on behalf of Transform Holdco LLC, Transform SR LLC, Transform SR Protection LLC. (ECF #9474)

HEARING re Supplemental Memorandum of Law in Opposition to the Debtors' Third Motion to Enforce the Asset Purchase Agreement (related document(s)9395) filed by Sean A. O'Neal on behalf of Transform Holdco LLC. (ECF #9483)

HEARING re Declaration of Sean A. O'Neal in Support of Transform Holdco LLC's Supplemental Memorandum of Law in Opposition to the Debtors' Third Motion to Enforce the Asset Purchase Agreement (related document(s)9483, 9395) filed by Sean A. O'Neal on behalf of Transform Holdco LLC. (ECF #9485)

HEARING re Declaration of Keith Stopen in Support of Transform Holdco LLC's Supplemental Memorandum of Law in Opposition to the Debtors' Third Motion to Enforce the Asset Purchase Agreement (related document(s)9483, 9395) filed by Sean A. O'Neal on behalf of Transform Holdco LLC. (ECF #9486)

Transcribed by: Sonya Ledanski Hyde

A P P E A R A N C E S :

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P R O C E E D I N G S

THE COURT: Okay. Good afternoon, everyone. This is Judge Drain, and we are here in In re Sears Holding Corp. et al, and more specifically for the evidentiary hearing on the -- well, it really is misnamed. But on the motion for relief from stay filed by the movants class representatives, Nina and Gerald Greene.

We had a conference on this matter in January of 2020 in which the parties agreed that the issue was whether the continued pursuit of the class action litigation in the Northern District of Illinois against an added party, i.e. Transform Holdco, would violate the Court's order approving the Asset Purchase Agreement between the Debtors and Transform Holdco and therefore be prohibited.

The parties agreed at that conference that this matter, if it couldn't otherwise be resolved by consent, would be dealt with on an evidentiary hearing basis based on the documents and, potentially, witness testimony. And we are here today under the amended pretrial orders consistent with that agreement. I have the joint exhibit book as well as the witness declarations. And unless there have been any further developments, I'm prepared to proceed with the evidentiary hearing.

Why don't I take the parties' appearances first.

MR. MATHER: Good afternoon, Your Honor. Ben

Mather and Janice Daul on behalf of the Greene class representatives from the Northern District of Illinois class litigation.

THE COURT: Good morning.

MR. BAREFOOT: Good afternoon, Your Honor. Luke Barefoot, Cleary Gottlieb Steen & Hamilton LLC, on behalf of Transform Holdco and its affiliates. And I am joined by my colleagues, Kristin Corbett and Jessica Metzger.

THE COURT: Okay. Good afternoon. All right. I see Mr. Kamlani on the screen. And of course for those reading the transcript, this is a Zoom evidentiary hearing under my prior orders. I gather that means that Mr. Kamlani will be the first witness?

MR. BAREFOOT: That's correct, Your Honor. He will be the first and only witness because Mr. Riecker is unavailable and therefore his deposition designations were submitted in lieu of live testimony.

THE COURT: Okay. And it's agreed that I can rely on those deposition excerpts?

MR. MATHER: Yes, Your Honor.

THE COURT: Okay.

MR. BAREFOOT: Together with his declaration as his direct testimony.

THE COURT: Okay. And as far as Mr. Allen, who also submitted a witness declaration?

MR. BAREFOOT: Your Honor, similarly, there's no dispute with respect to Mr. Allen's declaration.

THE COURT: So that's admitted as direct testimony?

MR. BAREFOOT: Correct, Your Honor.

THE COURT: Okay. And that's right, Mr. Mather?

MR. MATHER: That's correct, Your Honor.

THE COURT: Okay. All right. Very well. So let me just confirm one other thing consistent with the prior orders leading up to this evidentiary hearing. I have, as I mentioned, the joint exhibit book. And we've already referred to Joint Exhibit 7, which is the designated deposition transcript of Mr. Riecker. That's R-i-e-c-k-e-r for the court reporter. An Mr. Riecker's declaration appears at Tab 5, or is Exhibit 5. I just want to confirm that Exhibits 1, 2, 3, 4, 4 being the declaration of Mr. Allen, and 6 are all admitted for the purposes of this hearing.

MR. MATHER: Yes, Your Honor.

MR. BAREFOOT: That's correct, Your Honor.

THE COURT: Both parties are saying yes. All right, very well.

So, Mr. Kamlani, would you raise your right hand, please?

MR. KAMLANI: Yes, Your Honor.

THE COURT: Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?

MR. KAMLANI: I do.

THE COURT: Okay. And it's K-u-n-a-l, letter S, and then K-a-m-l-a-n-i. That's your name, how it's spelled?

MR. KAMLANI: Yes.

THE COURT: Okay, thank you. So, Mr. Kamlani, you have submitted a declaration in this contested matter. It's dated January 21, 2020. Sitting here today and knowing that it would be your direct testimony for this evidentiary hearing, is there anything in it that you would wish to change?

MR. KAMLANI: No, Your Honor, there is nothing.

THE COURT: Okay. And as I understand it, the parties have agreed that Mr. Kamlani's declaration is admitted as his direct testimony.

MR. MATHER: Yes, Your Honor.

THE COURT: Okay. So, Mr. Mather, would you like to go ahead with cross-examination?

MR. MATHER: I would, Your Honor. It's going to be fairly brief. I just want to make a couple points.

THE COURT: Okay, that's fine.

CROSS-EXAMINATION OF KUNAL KAMLANI

BY MR. MATHER:

Q Mr. Kamlani, do you have -- good afternoon.
A Afternoon.
Q Do you have your exhibit book in front of you?
A I do.
Q Could you open it to Exhibit 1?
A That would be the Asset Purchase Agreement?
Q Yes. I was just about to ask you to identify that document. Is it correct that you were involved in the negotiations of this document on behalf of Transform Holdco LLC?
A Yes.
Q Are you familiar with -- actually, strike that. Mr. Kamlani, let me turn you to or have you turn to Exhibit 2 in your book.
A I'm there.
Q I'll represent for you that this is a copy of the first amended class action complaint in the Greene v. Sears lawsuit pending in the Northern District of Illinois. Do you see that?
A I do.
Q When did you first become aware of the class action pending in federal court in Illinois?
A I first became aware of it when my lawyers at Cleary made me aware of it and suggested that I submit a declaration to the Court on the matter.

Q And that's in specific relation to this proceeding today, correct, Mr. Kamlani?
A Yes, that's correct.
Q So during the period that you were negotiating the Asset Purchase Agreement, you were not aware in any sense of the class action pending in the Northern District of Illinois?
A I don't recall being aware of it prior to the time that I mentioned.
Q Mr. Kamlani, what is ESL Investments?
A It's a hedge fund.
Q What is its relationship to Transform Holdco LLC?
A It is the majority owner of Transform Holdco LLC.
Q What was its relationship to Sears?
MR. BAREFOOT: Objection. At what period in time?
BY MR. MATHER:
Q In the period running up to the filing of the bankruptcy.
A It was a significant equity holder as well as debtholder in Sears.
Q So are you familiar with a gentleman named Edward Lampert?
A I am.
Q What is his role at ESL investments?
A He is the founder and CEO of ESL Investments.

Q Edward Lampert was the chairman and CEO of Sears for the period running up to when the bankruptcy was filed, is that correct?
A That is correct.
Q Okay. Thank you, Mr. Kamlani. I have no further questions.
THE COURT: Okay. Any redirect?
MR. BAREFOOT: Very briefly, Your Honor.
THE COURT: Okay.

REDIRECT EXAMINATION OF KUNAL KAMLANI

BY MR. BAREFOOT:
Q Mr. Kamlani, can I ask you to turn back to Exhibit 1, please?
A I am there.
Q If I could draw your attention to the final page of the exhibit, please, that bears the page number at the bottom 218.
A I see it.
Q And of the various principals and advisors that were involved in negotiating the sale transaction on behalf of Transform, who was responsible for reviewing and negotiating the terms of this Schedule 6.14?
A Our lawyers at Cleary were responsible for negotiating the legal terms of the Asset Purchase Agreement as well as all of the schedules.

Q And the first item on this schedule, sitting here today, do you understand that to be the class action that is at issue as a contested matter?
A I do as of today, yes.
Q So even if you were not personally aware of the existence of this litigation at the time of negotiation of the APA, what participants in the negotiation process on behalf of Transform would have been aware of this litigation?
A Presumably my lawyers from Cleary.
Q And just one final question, Mr. Kamlani. To what extent if any does your testimony in your declaration concerning your intentions with respect to Section 2.3(e) of the APA depend on the identification of these particular claims in this class action?
A Can we spend a minute on 2.3(e)?
Q Of course. Mr. Kamlani, if you could stay with what is Exhibit 1 in your exhibit book and go to Page 40 of that document at the bottom numeration.
A (indiscernible).
Q Sure. To what extent if any does the testimony in your declaration concerning the intention with respect to Section 2.3(e) of the APA depend on the identification of these particular claims in the class action?
A It doesn't. It has nothing to do with the claims in

the class action.

Q So your testimony would be the same regardless of whether the claims were known to you or not specifically known to you as of the time you were negotiating?

A That is correct.

MR. BAREFOOT: Nothing further, Your Honor.

THE COURT: Okay. Any recross on that, Mr. Mather?

MR. MATHER: No, Your Honor.

THE COURT: All right. Very well. So, Mr. Kamlani, I would normally say you can step down. But since you're on a screen, you can step away and turn off your computer. Although you can certainly feel free to listen in.

All right. Is there any additional evidence? I'm assuming not, because the hearing procedures order contemplated, I think, the process where the evidence that's currently before me would be submitted. But I just want to confirm. Is there any other evidence that the parties want to move for admission?

MR. MATHER: No, Your Honor.

MR. BAREFOOT: No, Your Honor.

THE COURT: Okay. All right. So the factual record for this evidentiary hearing is closed. I obviously have the benefit of the pleadings that were filed in this

contested matter, the original notice of motion, Transform's objection to the motion, the class representatives' reply, and Transform's reply to that, I guess a sur-reply, Docket Numbers 6212, 6366, 9470, and 9474. But I'm happy to hear brief oral argument as well.

MR. MATHER: Of course, Your Honor. As you noted at the outset, our goal here as the class representatives is to go back to the case in the Norther District of Illinois and proceed against Transform Holdco LLC as the successor in interest to the Debtor in the bankruptcy. Our position is that our claims have been assumed as part of the Asset Purchase Agreement by Transform Holdco LLC. We assert that our certified classes and their definitions fit within the definition of the "assumed liability" set forth in Section 2.3(e) in the Asset Purchase Agreement and that the agreement in its plain and ordinary meaning, it takes that result.

THE COURT: Okay. Okay. And I gather since you didn't submit any evidence as to the APA -- parol evidence that is as to the APA's interpretation or the intent of the parties -- and that's understandable since your clients weren't parties to the agreement, but conceivably you could have deposed Sears' representatives, for example, I'm assuming that your view on the parol evidence, if we have to get to it, is that it's inconclusive or doesn't support the

interpretation of "assumed liabilities" that Transform has offered up?

MR. MATHER: That's correct, Your Honor. To the extent that Mr. Kamlani has testified that he was unaware at the time that he was negotiating the agreement of our lawsuit, his testimony regarding the intention or what Section 2.3 or the "assumed liabilities" was supposed to include or not include is not probative on that issue.

And to your point, Your Honor, we don't -- we obviously have always taken the position since the inception of this proceeding that this is a matter for the Court's interpretation of the Asset Purchase Agreement. And that which the legal effect of Section 2.3(e) and related provisions.

THE COURT: Okay, thanks.

Mr. Barefoot?

MR. BAREFOOT: Thank you, Your Honor. I'll be relatively brief, but I do if Your Honor would permit want to just briefly walk through our arguments.

THE COURT: Okay.

MR. BAREFOOT: Your Honor, the sale order itself recognizes at Paragraph S that a key inducement to Transform's willingness to consummate the sale transaction was that the acquired assets were purchased free and clear and that Transform would not have consummated the sale if it

were liable for the excluded liability.

Mr. Mather began his presentation by talking about successor-in-interest liability. But Paragraph M of the sale order makes express that there is no theory under which Transform can be viewed as the successor-in-interest to Sears or can be held to any other liability theories based on successor liability.

THE COURT: Well, I don't think Mr. Mather would dispute that. I think when he referred to successor, he meant successor because of the express assumption of liabilities under 2.3 of the APA, not under any other theories than that.

MR. BAREFOOT: I just wanted to clarify since that was --

THE COURT: Right. But I think that's right. Right, Mr. Mather?

MR. MATHER: Yes, that's correct, Judge. Thank you.

THE COURT: All right.

MR. BAREFOOT: So, Your Honor, just both based on the plain text of the APA and the understanding of the parties, there is really no basis to revisit that understanding and characterize the class plaintiffs' claims for deceptive business practices and other theories that occurred before the closing as "assumed liabilities" now

that we are years after the closing of the sale transaction.

So I'll walk briefly through our arguments first on the plain text and then the parol evidence.

Section 2.3(e) provides that the "assumed liabilities" include "liabilities for warranty and protection agreements or other services contracts for the goods and services of sellers sold or performed prior to the closing." Your Honor, I emphasize that the parties used the words, "for warranty and protection agreements".

Now, the Plaintiffs argue that this use of the word has no special meaning, but the structure of the APA and the dictionary definitions that both parties rely on suggest otherwise. On the dictionary definitions, both parties rely on the same dictionary definition from the American Heritage Dictionary, under which "for" means, "used to indicate the object, aim, or purpose of an action or activity." And in this way, Your Honor, Plaintiffs' claims are not "for" the protection agreement liabilities. They may well "relate to" the protection agreement liabilities, they may "arise from" the protection agreement liabilities or have some other connection to the protection agreement liabilities, but they are not those liabilities themselves.

And if you contrast the way that was carefully worded and structured with other provisions of the APA where the parties used broader language to describe the assumed

liability, that's made clear.

If you just look at Section 2.3, Section 2.3(a) covers all the liabilities of the seller and its subsidiaries "arising out of the ownership of the acquired assets after the closing date."

Section 2.3(b) provides that Transform will take on liabilities "relating to the payment or performance of obligations with respect to the assigned agreements."

Section 2.3C stands out because it does not have broader connective words like relating to or arising out of. It is solely the protection agreement liabilities themselves.

But second, Your Honor, you can find no better evidence of the parties' shared interpretation than in the text of Section 2.4(c). And that's where the parties specifically addressed as distinct and "excluded liabilities" the type of claims the plaintiffs are asserting. Section 2.4(c) provides -- and this is on Page 42 of the APA -- provides that "claims or litigation arising out of the assumed liabilities, the acquired assets, or the operation of the business prior to the closing date" are all "excluded liabilities."

And there are two important canons of contractual interpretation that means that the Court has to give meaning and look to this language rather than the generic definition

of liability that the plaintiffs rely on.

First, Delaware courts have made clear that in interpreting the contract, the Court must read and give effect to the agreement as a whole. Here, the parties specifically addressed the separate treatment, litigation, or claims that arise out of the assumed liabilities and the acquired assets, as opposed to the treatment in Section 2.3(e), which is the liabilities for those claims.

If the Court were to accept the plaintiffs' reading that by using the generic term liabilities, Transform took on all litigation and claims that arise out of those liabilities, the entirety of Section 2.4(c) would have no meaning. It would effectively be read out of the contract.

And while Plaintiffs argue that the Court shouldn't even reach this because the lead-in to Section 2.4 carves out excluded liabilities, that would have the effect of giving this no meaning. Transform's interpretation, by contrast, gives meaning to both provisions reading the contract as a whole.

I want to briefly address, Your Honor --

THE COURT: Can we -- I'm sorry. Can we spend a little bit more time on that? If you -- I'm focusing now on 2.4 as opposed to 2.3. 2.3 is the "assumed liability" section, 2.4 is the "excluded liability" section. And the

introductory clause to the lettered subsections of 2.4 says not a buyer, any affiliated buyer, or any assignee "shall assume any liabilities of any sellers other than the assumed liabilities." And then it has the defined term, "(the foregoing including the following, the "Excluded Liabilitie's)".

So the class action representatives argue that all of the excluded liabilities are qualified by the fact that if something is an assumed liability, it doesn't fall into the list of (a) through (r) of "excluded liabilities." And I just want to make sure I understand your response to that because it went by fairly quickly, and I just want to make sure I understand your rationale for saying that (c), which I think arguably does provide that litigation claims for claims arising prior to the closing date are excluded. I guess my question is why isn't that qualified, however, by the exclusion from the exclusion of assumed liabilities.

MR. BAREFOOT: Your Honor, it's because you have to give meaning to the contract as a whole and you have to interpret the contract so that you give meaning to every phrase or clause. So if you look at the two phrases together in arriving at an interpretation of what the scope of the assumed liabilities are, you have to take into account that the parties specifically provided for different treatment for claims and litigation that arises out of the

assumed liabilities and the acquired assets, and separately provided for treatment that is assumption of the liabilities for those consumer protection agreements that are assumed liabilities. So if you read --

THE COURT: So in essence you're saying that by using different words, i.e. in 2.3(e) the word is "for" and in 2.4(c) the words are "arising from or related to", the parties actually made a distinction.

MR. BAREFOOT: Precisely, Your Honor. And if you accept plaintiffs' interpretation that the assumption of liabilities "for" is so broad that it captures the kinds of claims they've brought in the class action, claims for deceptive practices or unjust enrichment that in our view arise out of the assumed liabilities or relate to the operation of the business prior to the closing, you would effectively read 2.4(c) out of the contract entirely.

THE COURT: Although I'm assuming there may be other types of litigation liabilities besides ones coming from the assumed liabilities, right?

MR. BAREFOOT: There may be, Your Honor. But I think you also have to think about the canon of the specific versus the general. Delaware courts are very clear that where specific and general provisions arguable conflict, the specific provision qualifies the meaning of the general. And the term that plaintiffs rely on for the entire hook of

their argument is the defined term "liability" which is used broadly and repeatedly throughout the APA. But the specific circumstance of litigation or claims that arise out of the assumed liabilities is specifically addressed by 2.4(c).

THE COURT: Okay.

MR. BAREFOOT: Your Honor, it might help if I talk a little about the Old Carco/Chrysler case that plaintiffs rely upon, because I think it actually underscores this.

Very similarly there, there was a carveout in the lead-in to the APA discussion of excluded liabilities. And there the Court found that relying on the specific excluded liability that the debtors had pointed to -- that the buyer had pointed to -- would have led to internally inconsistent results because it would have resulted in specifically excluding something that in the assumed assets provisions was already included.

We have the exact opposite result here. Transform's interpretation is the one that leads to no inconsistency and gives effect to all of the language in the agreement. Transform took on liabilities for the protection agreements giving that one treatment as an assumed liability, but had separate specific treatment for claims arising out of those assumed liabilities, such as the class action claim.

So, unlike the situation in Old Carco where there

was a direct tension between the argument that the buyer was asserting, by adopting our interpretation, you can harmonize the two provisions and give effect to the contract as a whole.

Your Honor, just a couple other observations and then with your permission I'd like to move briefly to the parol evidence.

THE COURT: Okay.

MR. BAREFOOT: I think it bears noting, Your Honor, that the plaintiffs themselves operated nearly a year after the closing of the sale as though the litigation had not been assumed by Transform. And in particular in April 2019, the plaintiffs filed a number of proofs of claim against the Sears debtors, which is consistent with our interpretation of the APA under which those were excluded liabilities that were made with the estate. And those proofs of claim reserved rights against other Sears affiliates and made other generic reservations of rights but they nowhere contain any suggestion or reservation that the liability could have been assumed by or asserted (indiscernible).

THE COURT: Well, I mean, they -- just because Carco -- I'm sorry, just because Transform Holdco assumed the liability doesn't relieve Sears of it. Right? I mean, so they could file a proof of claim against Sears without

showing that they don't have a claim against Transform. On the other hand, I guess there is something to be said about the fact that the request to add Transform as a defendant to the litigation was made in December of 2019 when the sale order was entered in February of 2019. So I guess there is something to be said for that.

MR. BAREFOOT: Your Honor, just then turning to parol evidence. To the extent the Court finds any ambiguity in the text or any conflict between the different terms of the APA such that it needs to reach parol evidence, I think the parol evidence is uncontroverted that it was never the intent of either Sears, whose testimony you have in the form of Mr. Riecker as the lead negotiator, or Mr. Kamlani as the lead negotiator on behalf of Transform, to assume liability for the types of claims that are (indiscernible) the class action. They are in agreement that the intent behind assuming liabilities for the consumer protection agreements was consumer-facing to ensure business continuity and ensure consumer confidence in the brand that Transform was purchasing.

We've also included, Your Honor, as Exhibit 5 a loss spreadsheet that shows how the parties arrived at the estimate was used in the sale hearing proceedings of the $1.009 billion in estimated liabilities for the consumer protection agreements that were being assumed.

And notwithstanding that Transform had every incentive to include all possible forms of liability to make its bid as attractive as possible, there was no reserve or amount or any accounting for any liability with respect to the class action in calculating that figure. That evidence is uncontroverted.

It's also important to note, Your Honor, that as I mentioned, that $1.009 billion figure was not only something that was shared between the parties, but it was squarely placed before the Court with a description that comports with the parties' understanding. Specifically at the sale hearing, the Debtor submitted into evidence the declaration of Brandon Aebersold of Lazard. That's at Docket Item 2335, in which he testified that a component of the total consideration of the sale was an approximate $1 billion of protection agreement liability relating to consumer warranties sold by Sears (indiscernible). And there was similar testimony to that effect throughout the record of the sale.

Your Honor, the plaintiffs did have a full and fair opportunity and did pursue both document discovery and two depositions in addition to Mr. Kamlani's testimony today. And nothing they obtained in those efforts undermines or calls into question any of the testimony on intent from Mr. Kamlani or Mr. Riecker. The only point

they've seized on is that neither Mr. Kamlani nor Mr. Riecker were specifically aware of this particular litigation at the time they negotiated the Asset Purchase Agreement, and in particular Section 2.3(e).

That does nothing, respectfully, to undermine the strength of their parol evidence on the parties' shared intent on the purpose and scope, and it does nothing to suggest that the parties actually intended to assume liability for this or any other claim.

And the case, Your Honor, on this point -- and I'll note that Mr. Kamlani testified at the outset of the hearing that nothing about the identification of this particular class action does anything to change his testimony concerning the intent. The Plaintiffs in their papers rely on a case, Your Honor, Alpha Natural Resources, for the proposition that because they did not know about the class action, their parol evidence testimony is not probative. But that case, if you look at it, is actually quite inapposite. There, the court found that the parties never discussed the meaning or terms of the underlying agreement when it was proposed or when it was executed.

Here, the testimony is uncontroverted that the parties had significant discussions and negotiations around not only the APA, but around the specific sections. So the fact that they didn't know about the specific litigation

really has nothing to do with the strength of their testimony on the intended scope of the sections at issue. And their discussions and negotiations are with respect to the scope -- in the first case the scope of consumer protection liabilities and in the second case, the intent to exclude any and all litigations regardless of whether they were known or unknown.

Unless Your Honor has any further questions, I don't have any other remarks at this time.

THE COURT: I guess I just want to make sure I understand what Transform believes it assumed. I think what it believes it assumed is the following. If a purchaser or contractor of Sears' goods or services, regardless whether that was pre-closing of the APA or not, comes to assert a claim under the warranty or the protection agreement post-closing, Transform will be obligated to the extent that's a valid claim. Is that a fair summary of Transform's --

MR. BAREFOOT: I believe it is, Your Honor. And I believe that dovetails with the language in 2.3(e) that talks about liabilities for the goods and services of sellers sold or performed prior to the closing.

THE COURT: Okay. So if, for example, one of the members of the class has such a claim, Transform would honor it?

MR. BAREFOOT: Correct, Your Honor.

THE COURT: What Transform believes it did not assume would be claims arising pre-APA -- I mean demands for honoring the warranty that were made pre-APA or rights for breach of the warranty or protection agreement pre-APA.

MR. BAREFOOT: Or related causes of action like, you know, the treble damage consumer --

THE COURT: Right, consumer protection causes of action.

MR. BAREFOOT: Or unjust enrichment. Correct, Your Honor.

THE COURT: Okay. All right. Well, what I was really focusing on is the first cause of action in the class complaint, is a breach of contract claim. But I think that's for a pre-APA breach.

MR. BAREFOOT: That's correct.

THE COURT: If someone in that class said today I have a washing machine that's covered by the protection agreement and I'd like you to fix it, Transform would fix it if it's covered by the protection agreement.

MR. BAREFOOT: That's correct, Your Honor. And I think that's further underscored by the nature of the complaint, which is that it alleges that there were instances in which Transform sold consumer protection agreements for goods it could not service. So certainly it's Transform's position, and Transform has been performing

when a consumer who purchased a protection agreement prior to the closing comes into a store and presents a good that they claim is not working properly, they have been performing to perform repairs or replace the item.

THE COURT: Okay. All right. I don't think I have any other questions for you. Mr. Mather, do you want to briefly respond to that argument? Not just the last point, but the whole argument.

MR. MATHER: Thank you, Your Honor. Yes.

I think you hit the nail on the head in terms of asking these questions about what Transform thought that they did acquire the massive purchase agreement in relation to the master service -- master protection agreement in that it shows how the assumed liabilities at 2.3(e) and the definition of our class are intertwined in a way that they can't get away from, Your Honor. You know, our class essentially in its material terms reads as such, "All individuals who paid for aftermarket MPAs or products which were not covered by nor eligible for coverage under the MPA and did not receive a full refund."

So when they make their arguments about how they are going to -- they've assumed liability in terms of servicing the products, that's at the heart of what we sued over, Your Honor. They don't -- they received the money for these master protection agreements and then they don't -- in

certain circumstances end up not having coverage for certain items that were listed on the agreement. And in certain circumstances when that occurs, then they don't refund the money that's been paid pursuant to the agreement, and therefore the agreements in and of themselves originally were illusory. And so there is a way in which the way that they've written 23(e) is consistent with the excluded liabilities in -- I'm sorry, 2.3(e) and 2.4 -- in that the liabilities that they've assumed as part of the acquisition of the master protection agreements are those services that we claim in our lawsuit they, Sears had failed to provide as a breach of contract to those agreements, and Transform is essentially trying to get itself out from under those contractual obligations for the members of our class moving forward post Asset Purchase Agreement.

And I would also like to add, Your Honor, that if there is a way the excluded liabilities at 2.4, as you pointed out, could involve any litigation or liabilities extending out of litigation relating to any of the assets that were acquired as part of this agreement. And there's a much broader category than that which is set forth in Section 2.3(e) which specifically relates to the warranties and the liabilities that were assumed in relation to those.

THE COURT: Well, I guess I want to come back -- obviously there is a breach of contract claim in the

complaint. But again, if the master protection agreement or warranty doesn't cover the product, then I guess by definition I don't see how it's a liability that's being assumed. And I think I heard Mr. Barefoot say that if the warranty or master protection agreement does cover the product, Transform will honor it. So I don't think they are -- I don't think there is an allegation -- maybe I'm wrong -- that Transform hasn't honored it.

MR. MATHER: Your Honor, traditionally people were paying for Sears warranty coverage, believing that certain items in their home were covered, only to learn after paying for the coverage for years they weren't covered. And they made the claim Sears would say we never covered that product.

THE COURT: Right. But that's not a contract. That's not a breach of contract claim. That may be a consumer fraud claim or it may be a simple fraud claim, although I don't think there's -- well, maybe -- let's just say that I can understand saying, whether I grant a motion or deny a motion to dismiss on the merits, but I can understand the other causes of action in the complaint. You know, unjust enrichment, Pennsylvania Consumer Protection and Consumer Fraud, Illinois Consumer Protection and Consumer Fraud.

But you've described to me what Transform I think

also has described to me as not being in Transform's view what it assumed under the APA, it doesn't sound like a breach of contract claim.

MR. MATHER: Well, Your Honor, let me try to do it this way. Because I don't -- I'm not sure I'm being clear enough. The warranties would have a list of products in your home that would be covered. And you would be sold the master protection agreement based on the number and specific items that you wanted coverage for. So if those items are part of that agreement, then our breach of contract claim is that if you have been collecting payments for that coverage and then ultimately, for example, the refrigerator that was listed on that coverage and part of the pricing for that agreement wasn't in the end covered when you made the claim, then we submit, and I think the court in Illinois would agree, that that would be a viable breach of contract claim.

THE COURT: But you just -- but I was with you up to the point where you said it's then determined that it wasn't covered. Who determines that?

MR. MATHER: So the consumer, who submits a claim to Sears or presumably Transform and says that under my warranty with you, my Sub-Zero refrigerator was covered and it needs repair.

THE COURT: Right.

MR. MATHER: And that was part of the initial

bargain that was designated at the time of purchase. And then whoever is fielding these at this point says, no, actually whatever that was, we don't actually cover that specific refrigerator. That is the breach of contract that we have asserted in that case.

THE COURT: Well, but I guess I have two responses to that. First, when I read the complaint, I think what it lays out is that -- and I'm looking here at Paragraphs 24 through 35 -- well, actually, there is another example on 37. And I think what it sets out here is that the consumers were misled into thinking that their product would be covered, although there are additional limitations to coverage in the agreement that are identified, that's in Paragraph 28, and that if it turns out that the product isn't covered, Sears will refund your money.

So I guess I'm having -- what I don't see is an actual statement that that fact pattern constitutes a breach of contract. There's a -- when you get to the cause of action, it says in Paragraph 44, "Defendants breached the MPAs by failing to provide the benefits for which they contracted and received payment." But when you actually read the facts, it doesn't really ever allege that. It just says that at best I think they left the impression, albeit that that impression might be contradicted in the fine print, that the product was covered when in fact that

impression was inaccurate. And that's not really a breach.

And then of course there is the issue of the damages, which is just returning the money without interest isn't enough. But again, to me that doesn't sound like a breach. Again, it seems to me that if in fact Sears, or as assumed by Transform, Transform does breach the agreement by saying I'm not going to perform this where the agreement actually requires performance, that would be a different story and Transform would be liable for that. Transform has assumed that liability.

But not -- well, if -- let me back up. Because there is a timing element to this, too. I do not see in the agreement that Transform assumed a breach liability that Sears had before the APA. What Transform agreed to do is that it agreed to perform under the master protection agreements post-APA, even if the item was bought or the service was provided by Sears pre-APA. So it wouldn't be -- let's assume for the moment that Sears breached the agreement, that the agreement really did say you are covered because you bought this product and there were no carveouts, nothing like that. And Sears said, well, we're not going to perform, we're just going to give you your money back. That would be a breach by Sears. Let's assume for the moment that's the case. But I don't see because of the timing references in 2.3 that Transform assumed that liability.

What it assumed was the obligation to perform under the contract regardless whether the product was bought pre or after the APA was entered into. So I guess I'm still having a hard time seeing how the interpretation by Transform actually does subsume the complaint. I think there is a distinction between the causes of action asserted in the complaint and Transform's interpretation. That doesn't necessarily mean Transform's interpretation is accurate, but I think there is a difference between the liabilities asserted in the complaint and the liabilities that Transform says it's assuming.

MR. MATHER: Your Honor, if I may, just to redirect you back to the -- we have in our initial papers in this proceeding that we filed in December of '19, we listed -- we set forth in Paragraphs 13 and 14 the definitions of the two classes that were certified in that court in Illinois. And the first -- the primary class -- and this was on Page 4 if you have it --

THE COURT: I have it here.

MR. MATHER: Paragraph 13. "With respect to the breach of contract and unjust enrichment claims, the following nationwide class has been certified: All individuals and entities who paid for aftermarket MPAs from March 25, 2005 to the present, including post point-of-sale purchases of coverage, purchases of coverage for products

bought from a retailer other than Sears, and (indiscernible) renewal coverage for products which were not covered by nor eligible for coverage under the MPA and did not receive a full refund."

THE COURT: Okay.

MR. MATHER: So that is a certified class under breach of contract and unjust enrichment claims.

THE COURT: Right. But the class -- but they are defined by those who were not covered by the MPA. So I don't see how that could be a breach of contract.

MR. MATHER: Your Honor --

THE COURT: Would it be covered by the MPA?

MR. MATHER: Excuse me. Forgive me. Your Honor, they purchased an MPA, right? So they believed that they were covered as part of that contractual arrangement.

THE COURT: Okay.

MR. MATHER: Only to find out later that they weren't. So it's not people that aren't covered, it's people that believed that they were purchasing coverage.

THE COURT: But -- all right. But again, this is in the past tense. This is pre, I think, APA. And so I guess that's point one. That would be a liability that Sears would have. And I guess point two is -- well, I understand they did not receive a full refund because I think even under -- that would be a breach of contract.

Because I think Sears said if you're not covered, you're entitled to a full refund. So I understand that point. So I think it's really the timing point.

But again, I think if -- I don't see why that is inconsistent with Transform's position that what they're picking up are post-APA claims, which is normally what a buyer would be picking up. Although it could derive from goods and services bought from Sears pre-APA. But this isn't derived from goods and services bought pre-APA, it's derived from a breach by Sears pre-APA.

MR. MATHER: Well, yes, Your Honor. Although because of the nature of the product at issue here, there are people that would have bought potentially protection agreements pre-APA and don't know that they are sitting on illusory coverage that Transform may breach down the road. And under their interpretation of the APA are now absolved from any liability from them.

THE COURT: Right, but I think that's a different lawsuit. That's a lawsuit against Transform for Transform doing things contrary to the MPA post-closing. Contrary to the master protection agreement post-closing of the APA.

MR. MATHER: Well, it's tricky, Your Honor, because encompassed in our class is this idea that there are people who purchased protection agreements from Sears who have not triggered anything to date in terms of making a

claim to know that they are illusory. So those people are in that class, too. And I understand your point about that would be -- and I've thought about this myself, about how that would be another lawsuit against Transform. But we risk the possibility in terms of those individuals of Transform coming back and relying on the Asset Purchase Agreement because those people originally bought the master protection agreement from Sears.

THE COURT: No, but I think Transform acknowledges -- I mean, we could confirm this again -- that if someone has a claim under a master protection agreement or under a protection agreement, it doesn't matter when they bought the washing machine or received the service, you know, the oil change or whatever from Sears as long as the claim, you know, is for a repair today. So, but if it's a claim for something that Sears did before the Asset Purchase Agreement, then they say, well, we didn't take that on, which is logical.

I mean, no buyer really would take that on. That's a different relationship because they're not responsible for that; whereas, they want to be responsible for ongoing repairs. And I understand your point. It may be that when someone in the future says well, I'm covered, and they say, you're not, and then refuse to do a refund, to me, that's a breach under anyone's interpretation, but they

haven't -- there's no allegation they've done that. This is all based on Sears' conduct as opposed to Transform's, so I think it is a different lawsuit.

MR. MATHER: Your Honor, before I end my piece, can I check with my colleague to make sure that there's nothing she wants to --

THE COURT: Yes.

MR. MATHER: Your Honor, thank you. I'm done, unless you have any further questions for me.

THE COURT: No, I don't think so. Well, actually, I did. This is now a certified class, right? Actually --

MR. MATHER: Yes.

THE COURT: -- two classes that are certified. I --

MR. MATHER: That's right.

THE COURT: -- had assumed that, but I just wanted to make sure. Okay. Anything from you, Mr. Barefoot?

MR. BAREFOOT: Your Honor, I just wanted to briefly note that we're preserving our rights on the facts and characterizations of allegations of the lawsuit and, you know, nothing -- silence isn't an admission.

THE COURT: Okay. That's fair. And again, I'm not ruling on the lawsuit. I'm just trying to understand the claims and how they pertain to the two parties' different interpretations of what Transform assumed as a

liability under the Asset Purchase Agreement.

Okay. I have a motion before me by Nina and Gerald Greene as class representatives in respect of two classes certified by the District Court for the Northern District of Illinois in the class action that was pending there before the commencement of the Sears Holdings Corporation, et al. Chapter 11 case.

As originally styled, it was a motion for relief from the automatic stay in the Sears case for leave to join Transform Holdco as a defendant in the class action. Transform Holdco is the purchaser, or was the purchaser, of substantially all of Sears' assets pursuant to an Asset Purchase Agreement, a copy of which is attached at Exhibit 1 or is admitted as Exhibit 1 in this contested matter.

I think the parties realize that the request for stay relief was really an inapposite procedural vehicle, and have now agreed and, certainly at least since the January 2020 conference before the Court, have agreed that the dispute really goes to whether the action in the District Court in the Northern District of Illinois can proceed against Transform on the claims asserted in the action, in light of Transform's having acquired the assets pursuant to this Court's order, dated February 8, 2019, approving the Asset Purchase Agreement and authorizing the sale of the assets free and clear of liens, claims, interests, and

encumbrances.

In that order, the Court, in addition to directing that the sale be free and clear, provided, among other things, in Paragraph 21, that following the closing of the APA, "no holder of any claim against the Debtors or their estates shall interfere with the buyer's title to or use and enjoyment of the acquired assets based on or related to any such claim or based on the actions the Debtors may take in these Chapter 11 cases."

So, this contested matter, as it has stood since January of 2020, really invokes the Court's power as the gatekeeper of whether the litigation can proceed notwithstanding the Court's free and clear order approving the Asset Purchase Agreement.

Of course, every court has jurisdiction to interpret its own orders, including sale orders. See, for example, Travelers Indemnity Company v. Bailey, 557 U.S. 137, 151 (2009), but more specifically, it's well recognized in this Circuit and in this District that where there is a free and clear sale order, the bankruptcy court acts as the initial gatekeeper to determine whether a complaint, such as the complaint that the movants would like to add Transform to, would violate an enforceable provision of the sale order.

If it would, then they may not proceed with the

complaint as currently drafted. If it would not, they would be able to proceed in the appropriate non-bankruptcy forum, presumably, the District of Illinois, in the class action litigation. See Overton v. FCA U.S., LLC (In re Old Carco, LLC), 603 B.R. 877, 883 (S.D.N.Y. 2019), aff. 809 Fed. Appx. 36 (2nd Cir. 2020).

The issue here is a fairly narrow one. It involves the interpretation of primarily one provision of the Asset Purchase Agreement appearing in Article 2.3 thereof, which is headed "Assumption of Liabilities."

The movants acknowledge that unless Transform Holdco contractually assumed some or all of the liability for the claims that they wish to assert against it in the Northern District of Illinois class action, they would not be able to proceed against Transform Holdco in that action, and that is a correct assumption, i.e., even if they didn't acknowledge that, that would be the case given that the free and clear order very clearly provided that, except as expressly assumed by Transform Holdco, the buyer, Transform Holdco, takes free and clear with respect to all of the assets, and further, has no successor liability.

See, for example, Paragraphs M, 19, 22, and 27 of the free and clear order. Frankly, sometimes bankruptcy judges bridle at orders that are, as in this case, submitted that are 83 pages long because they have redundant

provisions, but nothing really is more important to a buyer in a bankruptcy case than getting free and clear status and being relieved of successor liability, obviously after due notice and the opportunity for a hearing and the like.

And that, too, is acknowledged in the order as to the importance to Transform Holdco, the buyer, of obtaining free and clear status. See Paragraph S of the order.

It's also recognized by the Second Circuit, among other courts, that "free and clear", as used in the Bankruptcy Code Section 363(f) means free and clear of all claims flowing from the Debtors' ownership of the assets that were sold, i.e., a broad reading of the statute. See In re Motors Liquidation Company, 829 F.3d 135, 154-56 (2nd Cir. 2016). As noted in that case and in other cases, that includes tort claims and contract claims, even if they don't give rise to a lien or some other property interest. See Douglas v. Stamco, 363 Fed. Appx. 100, 102-103 (2nd Cir. 2010), and In re Grumman Olson Industries, Inc., 467 B.R. 694, 702-03 (S.D.N.Y. 2012).

So, what we're asked to determine here, really, is a matter of contract interpretation, i.e., did, in fact, Transform Holdco in the Asset Purchase Agreement agree to assume the liabilities asserted in the Northern District of Illinois class action complaint, a copy of which is Joint Exhibit 2, or, instead, did it assume only a limited subset

of liabilities related to Sears' master protection agreements, which in essence are optional service protection agreements covering purchased products or services, similar to a warranty.

The Asset Purchase Agreement is governed by Delaware law to the extent that federal law does not apply, and the parties, I believe, have assumed that Delaware law controls here as far as contract interpretation is concerned. Even if they didn't, I would apply Delaware law in light of the choice of law provision in the Asset Purchase Agreement, Section 13.8(a).

Those principles are well understood and articulated. A good summary of the general principles appears in JFE Steel Corp. v. ICI Americas, Inc., 797 F. Supp. 2d 452, 469 (D. Del. 2011). "Under Delaware law, contract interpretation is a question of law. A court applying Delaware law to interpret a contract is to effectuate the intent of the parties. Accordingly, the court must first determine whether a contract is unambiguous as a matter of law.

"If the language of the contract is unambiguous, the Court interprets the contract based on the plain meaning of the language contained on the face of the document, and indeed, the use of extrinsic evidence to interpret clear and unambiguous language in a contract is not permitted. A

contract is ambiguous only if it is fairly or reasonably susceptible to different interpretations. If a contract is unambiguous, the Court should interpret it as a matter of law, making summary judgment potentially appropriate.

"Delaware principles of contract interpretation also require the Court to read a contract as a whole and give each provision and term effect so as not to render any part of the contract mere surplusage. Delaware adheres to the objective theory of contracts, which means that a contract should be interpreted as it would be understood by an objective, reasonable third party.

"Finally, when two sophisticated parties bargain at arms' length and enter into a contract, the presumption is even stronger that the contract's language should guide the Court's interpretation." Internal citations and quotations omitted.

As to ambiguity, the Court in Rhone-Poulenc Basic Chemicals, Co. v. American Motorists Insurance Company, 616 A.2d 192, 195 (Del. 2011), stated "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.

"Ambiguity does not exist where the court can

determine the meaning of a contract without any other guide than a knowledge of the simple facts of which, from the nature of language in general, its meaning depends. Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant" -- and I'm adding this language, from its plain terms. Again, quotations and citations omitted.

The Rhone-Poulenc court also cites Steigler v. Insurance Company of North America, 384 A.2d 398, 401 (Del. 1978), for the proposition that "contracts should be read to accord with the reasonable expectations of a reasonable purchaser."

As noted in those authorities, a court may resort to extrinsic evidence to determine the meaning of a contract only if it is ambiguous. As stated in In re Safety-Kleen Corp., 380 B.R. 716, 738 (Bankr. D. Del. 2008), "This extrinsic evidence may include the structure of the contract, the bargaining history, and the conduct of the parties that reflects their understanding of the contract's meaning."

The court goes on to cite In re Eagle Industries, Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1233

(Del. 1997) For the proposition that "in construing an ambiguous contractual provision, a court may consider evidence of prior agreements and communications of the parties as well as trade usage or course of dealing."

The Safety-Kleen Corp. continues -- still at page 738 -- by stating, "Of these areas of inquiry, particular importance is often placed on the conduct of the parties. Courts of this state have long looked to relevant facts and circumstances surrounding the contract including the actions of the parties in ascertaining the intention of the parties. Such actions are of great weight in determining the meaning and applicability of the contract and lead the Court to a presumptively correct interpretation."

The parties here each assert that the relevant contract language and the operation of that language within the entire agreement leads unambiguously to their respective interpretations of which liabilities, as relevant here, Transform Holdco actually assumed.

Transform Holdco has introduced evidence in the event that I conclude that the contract is nevertheless ambiguous, but I will address first whether the contract, based on the objective, reasonable interpretation of its plain terms, is, in fact, unambiguous on this point; and based on my review of the APA, I conclude that indeed it is not ambiguous as to which liabilities Transform Holdco

assumed.

First, I should, however, address the liabilities or claims that are asserted in the class action complaint, which again, appears at Exhibit 2 in the record, that is, the first amended class action complaint. That complaint was commenced as a class action in 2015 against Sears Protection Company, Sears Roebuck and Company, and Sears Holdings Corporation alleging deceptive business practices under Pennsylvania's Unfair Practices and Consumer Protection law, 73 P.S. Section 201-2(4)(xxii), and a violation of Illinois' Consumer Fraud Protection Act -- I'm sorry, Consumer Fraud and Deceptive Practices Act, 815 Illinois Comp. Stat. 515 et seq.

In addition, it asserts breach of contract and unjust enrichment claims against those parties. All of the claims relate to the defendants' so-called master protection agreements or MPAs, which again, are optional service protection agreements for which a customer of Sears would pay relating to the company's obligation to repair and service designated purchased products or related services. They resemble a warranty, although they're prepaid optional agreements.

It is asserted at Paragraphs 3 through 6 of the complaints that "These service protection agreements were deceptive and illusory because Sears did not, in fact,

provide the bargained for coverage of the products that the agreements purported to cover. Instead, without making an initial determination about whether Sears would actually provide for the products for which Sears was selling service protection agreements, Sears collected money from plaintiffs and, on information and belief, from other consumers for products that Sears ultimately refused to service because upon receiving the claim for service, Sears determined were not actually covered." That's a quote from Paragraph 3 of the complaint.

The complaint goes on to state that "When plaintiffs and the members of the class made claims for service on products that the service agreements purported to cover, Sears would make a determination of whether the product on which the claim was made was one for which Sears would actually offer service.

"If Sears then determined not to offer service, Sears would offer to refund some of the money it had collected from plaintiffs and members of the class for the service agreements. On information and belief, Sears does not make efforts to determine whether it actually covers a product the service agreements purport to cover until a consumer makes a claim under the service agreement.

"Accordingly, unless a consumer makes a claim for service on a product that Sears does not actually service,

Sears keeps the consumer's money even though Sears never would have serviced the purportedly covered product. Thus, unless Sears is caught when a consumer makes a service claim, Sears effectively appropriates profits to itself by selling consumers meaningless service agreements and keeping their money.

"Accordingly, through an unlawful course of conduct, Sears has, over the course of years, improperly and unilaterally breached the express and implied terms of its standard form contract with plaintiffs and the class who are purchasers of the protection agreements. Defendants have also taken monies from plaintiffs in the class to which defendants had no right at law or in equity for alleged service protection which was never provided."

That's all from Paragraphs 4 through 6 of the complaint. The complaint's factual allegations as to support those contentions start at Paragraph 23 of the complaint and, in essence, it appears to me, assert in essence a bait-and-switch type of arrangement, whereby customers are led to believe that the MPA covered the product that they were buying although, in fact, it did not or there were limitations to the coverage as to what was, in fact, covered.

Those paragraphs run through Paragraph 41, from Paragraph 23. The class has since been certified in really

two subclasses or two nationwide classes. This is laid out in the original motion to this Court and not disputed, and that was done in a memorandum opinion and order from the Illinois District Court from 2018, i.e., before the commencement of this Chapter 11 case:

"With respect to the breach of contract and unjust enrichment claims, the following nationwide class has been certified. All individuals and entities who paid for after-market MPAs on March 25, 2005 to the present (including post-point of sale purchases of coverage, purchases of coverage for products bought from a retailer other than Sears and/or subsequent renewals of coverage) for products which were not covered by nor eligible for coverage under the MPA and did not receive a full refund."

A second class was also certified in the same memorandum opinion and order. It comprises, with respect to the Pennsylvania Unfair Trade Practices and Consumer Protection law claim, the following Pennsylvania-only class: "All residents of Pennsylvania who paid for after-market MPAs on March 25, 2009 to the present (including post-point of sale purchases of coverage, purchases of coverage bought from a retailer other than Sears and/or subsequent renewals of coverage) for products which were not covered by nor eligible for coverage under the MPA and did not receive a full refund."

Of course, implicit in that, I believe, and in the fact that the litigation did not proceed to a determination of liability at the time that Sears' Chapter 11 case started and since then, since the automatic stay has remained in place as to Sears, is that the court has not determined whether assertion that products were not covered was, indeed, a breach of contract or whether a refund was, in fact, owed in such circumstances under the parties' agreement or a breach of the Pennsylvania Unfair Trade Practices and Consumer Protection law.

Transform Holdco purchased substantially all of the Debtors' assets under an Asset Purchase Agreement dated as of January 17, 2019, by and among Transform Holdco, LLC, Sears Holdings Corporation, and its subsidiaries party thereto. That, again, is Joint Exhibit 1.

The APA provides in Section 2.1 that the acquired assets shall be acquired "free and clear of any and all encumbrances of any kind, nature, or description and any claims," encumbrances and claims being defined terms as found at Page 13 and 8 respectively, of the APA. The definition of claims in the APA mirrors the broad definition in Section 101(5) of the Bankruptcy Code. Clearly, the claims asserted in the first amended complaint at J., Exhibit 2, would be encompassed by the definition of "claims".

The consideration provided by Transform Holdco in return for the acquired assets included, among other things, an assumption of specific -- and this is a defined term with initial caps -- Assumed Liabilities, and it is this defined term first used in Section 2.3 of the APA that the parties are primarily fighting over. 2.3 begins by stating, "Upon the terms and subject to the conditions of this agreement, on the closing date, buyer or the applicable assignee shall assume effective as of the closing and shall timely perform and discharge in accordance with their respective terms the following Liabilities" -- and liabilities is an upper case term defined at Page 21, which incorporates the defined term Claim as well as the defined term Action which appears at Page 3, that defined term including litigation and legal proceedings, and then that is collectively defined as the Assumed Liabilities.

The first three categories of Assumed Liabilities all pertain to liabilities arising on or after the closing date or designated assignment date of the APA, and this is a typical concept for an acquirer in a Chapter 11 sale. It takes on the obligations post-acquisition but does not want to take on obligations that already existed or arose pre-bankruptcy.

The key section in article -- or Section -- 2.3 for purposes of this dispute is Section 2.3(e) which states,

"Subject to Section 2.8(e)" -- which no party has believed is relevant -- the buyer is assuming "all liabilities for warranties and protection agreements or other services contracts other than warranties relating to intellectual property for the goods and services of sellers sold or performed prior to the closing, including any liabilities owed by Sears Re" -- that's one of the Sears affiliates, Sears Re -- "to any seller in respect of reinsurance of such warranties and protection agreements." And that's a defined term, the PA Liabilities.

Interestingly, under the Asset Purchase Agreement free and clear Order, Transform did not receive an assignment of those agreements, i.e., the PAs, the MPAs, or warranties under Section 365 of the Bankruptcy Code. Instead, it simply assumed the sellers' obligations pursuant to and in accordance with Section 2.3(e) of the APA. That's found in Paragraph 18 of the free and clear Order.

That's clearly in distinction with a separate defined term, Assigned Agreements, and that has relevance here because one cannot assume and assign a contract under the Bankruptcy Code that's executory unless one cures all defaults under the agreement that were existing pre-assignment.

Section 2.3(g) of the APA actually provided for all cure costs solely with respect to the assigned

agreements, i.e., the parties bargained for Transform to pick up those pre-assignment cure costs, but the parties chose not to have the MPAs and other warranty-like agreements referred to in Section 2.3(e) be assumed under 365 as Assigned Agreements, but, rather, to treat them as simply Assumed Liabilities "for", again, such warranties and protection agreements.

Transform contends -- and this was made, I believe, crystal clear on the record today -- that in assuming such liabilities under Section 2.3(e), it agreed to perform the MPAs and other similar warranties as covered in that section regardless when the MPA was entered into or when the good or service was provided to the customer, but only on a going-forward basis, i.e., it did not agree to assume claims against the sellers, i.e., including the three defendants in the Illinois District Court class action for their breach or liability, arising before the APA closing date with respect to such warranties and protection agreements or other service contracts.

Besides the plain language of Section 2.3(e), which states that what is being assumed are all liabilities "for" warranties or protection agreements or other service contracts, as opposed to all liabilities "arising from or related to" warranties and protection service agreements or other services contracts for the goods and services seller

sold or performed prior to the closing, transform points to Section 2.4 of the APA, which is headed "Excluded Liabilities." That section begins by stating, "None of buyer or any affiliate of buyer or any assignee shall assume or be deemed to assume or become obligated hereunder in any way to pay or perform any Liabilities" -- again the upper case defined term -- "of any sellers or any of their respective affiliates of any kind or nature, known, unknown, contingent, or otherwise, whether direct or indirect, matured or unmatured, other than the Assumed Liabilities (the foregoing including the following, "the Excluded Liabilities") which shall include the following liabilities."

And among the following liabilities is set forth in Section 2.4(c), "All liabilities arising from or related to any claim, action, arbitration, audit, hearing, investigation, suit, litigation, or other proceeding arising out of the assumed liabilities, the acquired assets, or the operation of the business prior to the closing date or relating to facts, actions, omissions, circumstances, or conditions existing, occurring, or accruing prior to the closing date against any seller or its affiliates."

Just as with Section 2.3, many of the provisions, including 2.4(a), 2.4(b), 2.4(d), as well as 2.4(c), make a distinction between pre-closing date and post-closing date

liabilities: again, a logical distinction given the fact that buyers do not want to assume liabilities, unless it's obviously negotiated with their seller, in a bankruptcy case for the pre-closing period.

The class representatives contend that, first, the plain meaning of Section 2.3(e) is broad enough to subsume not only the interpretation given it by Transform, but also the claims asserted in their litigation. They do so notwithstanding that those claims are claims for Sears' conduct and that that conduct includes, in addition to breach of the MPAs also claims for unjust enrichment of Sears, i.e., Sears kept the money that was paid in respect of the MPAs, and for deceptive practices under the Pennsylvania and Illinois consumer protection statutes.

They contend that the excluded assets provision that I previously read is qualified in full by exclusion from it, i.e., an exclusion from the exclusion, of any Assumed Liabilities, so, they contend, it really does not add anything to Transform's argument, given that the reading of 2.3(e), as they read it, would subsume the liabilities asserted in the class action complaint.

Based on my reading of these provisions, I conclude, to the contrary, that the plain meaning of 2.3(e) is that Transform assumed liabilities under the warranty and protection agreements, including the MPAs, for products

covered by those agreements regardless whether they were sold or the services were performed before or after the closing of the APA, but that those obligations assumed are only for ongoing, i.e., post-APA closing, performance, that the use of the word "for" in Section 2.3(e) as opposed to "arising from or related to", particularly when one reads the different language of "arising from or relating to" in 2.4(c), I believe, makes it clear to a reasonable reader that Transform was not assuming liabilities for Sears' or any of the other two defendants' in the Northern District of Illinois class action breach or other misconduct relating to the MPAs referenced in the first amended complaint.

The claims in that complaint are all for, as far as the actions complained of, pre-closing alleged misconduct by the named defendants. No misconduct post-closing by Transform is asserted.

It is, of course, conceivable that there might be such a claim against Transform if, in fact, Transform breaches the MPAs post-closing, or if there is a contract right to the return of money paid under the MPAs that Transform refuses to return. But those facts are not alleged in the first amended complaint, and therefore it appears to me that that liability, based on the plain language of 2.3(e) of the APA, was not assumed, and therefore, that the motion to name Transform as a party

defendant to the Northern District of Illinois class action must be denied.

The second provision of the agreement that has attracted most of the parties' attention, i.e., 2.4(c), is, to some extent, circular in that it excludes from the exclusion the "assumed liabilities". However, it appears to me, that there is a clear and important difference between the language in 2.3(e) with regard to that assumed liability, which again, says assumed liabilities "for" or liabilities "for" the protection agreements and warranties, and 2.4(c), which refers to all liabilities arising from or related to any claim prior to the closing date, and I think that is an important distinction.

Thus, it appears to me that the holding in Bennett v. FCA U.S., LLC (In re Old Carco, LLC), 587 B.R. 809 (Bankr. S.D.N.Y. 2018), where my colleague Judge Bernstein had to interpret a somewhat similar dispute as to whether an Asset Purchase Agreement agreed or provided for the buyer to assume a liability or not, is not particularly helpful to the movant class action representatives. In that case, the parties to the APA entered into a clear amendment to the assumed liabilities provision in the APA.

I want to make sure that we're still on, because the screen has gone blank. Are we still on the sound? Yes. Okay. I'm looking at --

MR. BAREFOOT: We can hear you find, Your Honor.

THE COURT: Oh, good. Very well. Thank you. The amendment number four to the Master Transaction Agreement whereby GM sold substantially all of its assets -- I'm sorry, whereby Chrysler sold substantially all of its assets, was clearly amended to add clearly defined "assumed liability" that had not been in the agreement before. Given that addition, the interpretation offered by the buyer of Chrysler's assets was clearly contradictory and inconsistent with the parties' intentions, as evidenced by the amendment, and, therefore, the reference to the assumed liabilities in that provision could easily be interpreted to require enforcement of Amendment No. 4.

Here, the difference in language between 2.4(c) and 2.3(e) really requires, I believe, the opposite result, which is that it appears clear that the parties made a distinction between the excluded liabilities arising from or related to the assumed liabilities and the assumed liability as delineated at least in 2.3(e) which is more narrowly drafted. Again, I will also come back to the logical point that it is highly unlikely that a buyer such as Transform would agree to assume liabilities that don't involve an ongoing relationship with a customer, such as the liabilities in the first amended class action complaint.

The circumstances under which that would've been

done would, to my mind, have been clearly touted as additional consideration to the Debtors' estates as part of the process, which was hotly contested by those objecting to the APA, of seeking approval of the APA.

This is an important aspect of contract interpretation, not really a parol evidence point, as recognized by the Second Circuit in yet another automotive bankruptcy case, In re Motors Liquidation Company, 943 F.3d 125, 132 (2nd. Cir. 2019), where the Circuit said "Appellants offer no convincing reason why it was commercially advantageous for New GM to contractually assume claims for punitive damages, nor did they account for the telling fact that when Section 2.3(a)(9) was amended, nobody appears to have contemplated New GM assuming liabilities for punitive damages.

"Furthermore, as the bankruptcy court observed, the idea that New GM would silently choose to assume inestimable millions of dollars in punitive damages is inherent entirely implausible. Accordingly, the terms of the sale agreement reflect," and then the Circuit went on to say, "and extrinsic evidence confirms that New GM did not contractually assume claims for punitive damages based on old GM's conduct."

I don't believe that I need to get to the parol evidence on this point, as I've said, but I will note that

that parol evidence in the form of the three declarations whose admission as direct testimony has been confirmed, that is of Mr. Kamlani, Mr. Allen, and Mr. Riecker, R-I-E-C-K-E-R, all support the notion that when illustrating the consideration's value for the assumption of liabilities at approximately $1.1 billion, $1.009 billion of which were for the assumption of liabilities for protection agreements like the MPAs, the contingent litigation liabilities such as those set out in the class action complaint were not considered.

See, for example, Paragraph 7 of Mr. Allen's declaration. Mr. Allen is the associate at Cleary Gottlieb Steen and Hamilton who was active in representing Transform in its negotiation of the APA and, as Mr. Kamlani testified on cross, would've known of the schedule which listed that litigation, would've been aware of that litigation, Schedule 6.14 of the APA.

Similarly, Mr. Riecker, who was one of the lead negotiators for Sears, acknowledged in his declaration again that the -- that he does not believe there was any attempt to have Transform assume pre-existing litigation associated with the protection agreement liabilities. That's in Paragraph 17 of his declaration, and he echoes the valuation point of the $1.009 billion for assumed liabilities on Paragraph 10, as does Mr. Kamlani in his declaration.

Now, both Mr. Kamlani and Mr. Riecker have acknowledged in cross and in their -- in Mr. Riecker's deposition testimony, respectively, that they were not actually aware of the class action litigation when negotiating the agreement. However, I believe -- and again, they're both sophisticated parties, without doubt -- an intention to assume more than simply ongoing warranty liabilities would've been a major concession by Transform in the negotiations for which it would've wanted to take full credit in order to justify the Court's approval of its agreement over, among others, the Official Creditors Committee's objection to it, and the fact that that concession was not referenced in the testimony in support of the agreement, and indeed the roughly $1 billion valuation was echoed in the witness declaration of Mr. Aebersold from the Debtors' investment banker Lazard as part of the testimony in support of the APA, to me highlights and reinforces the notion that this is not the type of liability that a buyer would be expected to or would normally assume under an Asset Purchase Agreement -- in any Asset Purchase Agreement, but certainly from a debtor in bankruptcy.

So, the parol evidence, I believe, clearly supports the interpretation that Transform is -- has put on the agreement, and for that reason, if I were to find the agreement to be ambiguous, the evidence would tend to

confirm that the parties to the agreement intended to operate as Transform has stated in its interpretation of it for purposes of this contested matter.

So, I will deny the motion and ask Transform to submit an order to chambers to that effect and stating that the Court's free and clear. Order precludes the class representatives from joining Transform as the defendant in the first amended complaint in the Northern District of Illinois litigation or pursuing those claims against it.

You don't need to formally settle that order, but obviously you should run it by Mr. Mather before you email it to chambers and copy him on the email so that he can make sure it's consistent with my ruling. You don't need to put this in the order, but again, as I stated during oral argument, my ruling obviously does not preclude parties to protection agreements from asserting their rights in those agreements for Transform's own conduct post-closing. But that's really not what I believe that this complaint is about.

So, are there any questions?

MR. BAREFOOT: No, Your Honor, and we will submit an order in accordance with instructions.

THE COURT: Okay. Thank you. I obviously gave the parties a fairly lengthy bench ruling. I think they've probably been waiting long enough, partly because of COVID

and the like, to have this issue decided. When I give a lengthy bench ruling, I may go over the transcript, in addition to correcting typos or the like, I may change a sentence or two if I think that I said something inartfully. If I do edit it, I will file it as a separate bench ruling, not as the transcript, but the holding won't change, so I'll look for that order.

MR. BAREFOOT: Thank you, Your Honor.

MR. MATHER: Thank you, Your Honor.

THE COURT: You don't have to wait for the transcript to submit the order.

MR. BAREFOOT: Understood.

THE COURT: I want to thank both of you for organizing the hearing on this so efficiently and laying out the issues under remote conditions. Thank you.

MR. BAREFOOT: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 4:12 PM)

I N D E X

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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